HO SHEE CHIT & ANOR.

v.

BRUUSGAARD KISTERUDS SKIBSAKSJESELSKAP & ANOR.

FEDERAL COURT, KUALA LUMPUR
SUFFIAN LP
SALLEH ABAS FJ
ABDUL HAMID OMAR FJ
[CIVIL APPEAL NO. 60 OF 1978]
26 MARCH 1982

CIVIL PROCEDURE: *Judgment - Trial Judge delivered oral judgment - Counsel made notes of judgment delivered - Whether Court of Appeal could accept counsel's notes - No written grounds of judgment - Whether appeal court could proceed without written judgment.*

This is an appeal against the judgment of the learned trial Judge of the High Court, Kuala Lumpur who gave oral judgment on 21 April 1978 against the appellants and the respondents.

The Federal Court did not have the grounds of the learned trial Judge's judgment but Mr. Peddie who was counsel for the respondents in the High court made notes of what the learned Judge said prior to delivering judgment. Mr. Pradhan counsel for the respondents applied for the affidavit of Mr. Peddie containing those notes to be received by the Federal Court but Mr. Palasuntharam counsel for the appellants opposed the application.

Held:

[1] The provisos to the new Federal Court rr. 68 and 62(4)(e) make it clear that the intention is that an appeal should be allowed to go on even if no grounds of judgment have been supplied by the learned trial Judge. The new rules do not prohibit the appellate Court from looking at the affidavit of Mr. Peddie, who is after all an officer of the Court, if that should serve the cause of justice.

[2] While r. 68 places on a Judge, who has given oral judgment the duty of "certifying in writing the grounds" of his judgment, nevertheless it is eminently desirable for counsel to take a note of the judgment, especially if his client is likely to appeal in case judgment goes against him.

[3] Counsel should refer the note first to counsel on the other side and then to the trial Judge for his comment, if the note is agreed. It is desirable that this reference to be made as soon as possible, otherwise he might forget. If the Judge certifies the agreed note as a true record of the grounds of his judgment it may be treated as the written certificate of his judgment within r. 68.

[4] In the circumstances of this appeal the Court would receive Mr. Peddie's affidavit after it is referred to counsel for the appellants to give him an opportunity to comment, and then it, together with his comment if any, be submitted to the learned Judge for his comment.

[5] A date will be fixed for hearing arguments on the merits, after action has been completed in accordance with the Court's directions.

[Order accordingly.]

Cases referred to:
Tan Kim Leng v. Chong Boon Eng [1974] 2 MLJ 151
Thompson v. Andrews [1968] 1 WLR 777
Pitman v. Southern Electricity Board [1978] 3 All ER 901
Malins v. Price 41 ER 757
Cattell v. Corrall 160 EE 763
Sims v. Wilson [1946] 2 All ER. 261
Hayman v. Rowlands [1957] All ER. 321
Bruen v. Bruce [1959] 2 All ER 375

Legislation referred to:
Federal Court Rules 1980, rr. 62(4), (4)(e), 68
Federal Court (Civil Appeals) (Transitional) Rules 1963, r. 19(4)(a)

Other source referred to:
Halsbury's Laws of England, 4th Edn, Vol. 3, p. 622

For the plaintiffs/respondents - V.P. Pradhan
For the defendants/appellants - V.K. Palasuntharam; (S. Kulasegaran with him)

JUDGMENT

Suffian LP:

There was a dispute between the two plaintiffs (respondents before us) and the two defendants (appellants), the matter came before the Court and on 21 April 1978, the learned trial Judge gave oral judgment against the defendants.

The defendants appeal, but unfortunately we do not have the grounds of the learned Judge's judgment.

Mr. Peddie who was counsel for the plaintiffs in the High Court made notes of what the leaned Judge said prior to delivering judgment, and Mr. Pradhan for the two plaintiffs apply for the affidavit of Mr. Peddie containing those notes to be received by us. Mr. Palasuntharam for the defendants oppose the application.

So the question is whether or not we should receive Mr. Peddie's affidavit. It is agreed by Mr. Pradhan that if we do, the notes should first be submitted to the learned Judge for his comment before we proceed to hear arguments on the merits of this appeal.

Under the old rules, the Federal Court (Civil Appeals) (Transitional) Rules 1963, published on 26 September 1963, as L.N. 242, appellants had difficulty about proceeding with their appeals if no grounds had been furnished by the trial Judge, for r. 19(4)(a) provided that the appeal record should contain among other things:

> (e) the certificate, if any, given by the Judge of the grounds of his judgment or order or, if a written judgment was delivered, a copy thereof;.

See *Tan Kim Leng v. Chong Boon Eng* [1974] 2 MLJ 151.

To remove this difficulty the new Federal Court Rules 1980, published as P.U. (A) 33, on 7 February 1980, have been differently worded, to make it quite clear that an appeal may proceed when no grounds have been supplied. Rules 68 and 62(4) thereof are relevant. Rule 68 provides:

> On the application of [the appellant, the trial Judge] who gave [the judgment appealed from] shall, unless the judgment was written, certify the grounds of such judgment...; but delay or failure to so certify shall not prevent the appellant from proceeding with his appeal.

Note the proviso beginning with the word "but".

Rule 62(4) provides that the written judgment or the grounds thereof must be included in the appeal record prepared for the use of our Court, but this is again subject to a proviso:

> provided that the absence of the written judgment or grounds of decision shall not prevent the appellant from proceeding with his appeal.

Cases were cited from England on the procedure in an appeal to the Court of Appeal where there are no grounds. One provision cited is O. 59 r. 12 (previously O. 58 r. 11) which reads:

> Where any question of fact is involved in an appeal, the evidence taken in the court below bearing on the question shall, subject to any direction of the Court of Appeal, be brought before that Court as follows:
>
> (a) in the case of evidence taken by affidavit, by the production of printed copies of such of the affidavits as have been printed, and office copies of such of them as have not been printed.
>
> (b) in the case of evidence given orally, by a copy of so much of the transcripts of the official shorthand note as is relevant or by a copy of the Judge's note, where he has intimated that in the event of an appeal his note will be sufficient, or by such other means as the Court of Appeal may direct.

We do not think that decisions on this provision help - for it deals with notes of evidence, whereas here we are concerned with notes of judgment. These decisions are: *Earl De Le Warr v. Miles* XLV Law Times 424, *Thompson v. Andrews* [1968] 1 W.L.R. 777. *Pitman v. Southern Electricity Board* [1978] 3 All ER 901.

Two old cases cited, *Malins v. Price* 41 ER 757 and *Cattell v. Corrall* 160 EE 763, are also not relevant because they too deal with evidence, not judgment.

The provisos to our new Federal Court rr. 68 and 62(4)(e) make it clear that the intention is that an appeal should be allowed to go on even if no grounds of judgment have been supplied by the learned trial Judge. In our judgment, nothing in the new rules prohibits us from looking at the affidavit of Mr. Peddie, who is after all an officer of the court, if that should serve the cause of justice.

In the Weekly Notes of 10 April 1943, at p. 80 (1943) WN 80., there appears this Practice Note:

Practice Note

> *Appeal - Court of Appeal - County court - County court Judge's judgment - Counsel's note.*
>
> On an appeal from a county court in which no shorthand transcript or other note of the judgment of the county court Judge was available for use of the Court of Appeal.
>
> Scott LJ said that the court had been furnished with notes of the judgment of the country court Judge which had been taken by counsel briefed in the action. That was a very proper procedure and was to be commended. He wished to point out that it was the duty of Counsel always to take a note of a judgment, and, if there was no other note available for the purposes of an appeal, the note taken by one of the Counsel, or both of them, if they both had taken notes, should be available for the use of the Court of Appeal. If the notes of Counsel agreed it would not be necessary that both notes should be supplied to the Court, but if they differed Counsel should endeavour to agree on what the Judge had actually said.

In *Sims v. Wilson* [1946] 2 All ER 261, Morton LJ said at p. 264:

> This brings me to a matter on which it might be useful if I said a few words. In the present case there was no agreed note of the judgment of the county court Judge, although it is quite plain from what we are told that he did deliver an oral judgment. We are informed by the associates that in a case before this court on 30 March 1943, Scott, LJ, said this [see Practice Note, (1943) W.M. 80(2)):
>
> > It is the duty of Counsel to take a note of the judgment in the Court below, and, if no note of the judgment is taken by Judge for the purpose of an appeal, Counsel's note should be available, for the use of the Court of Appeal in addition to the Judge's note of evidence.
>
> I respectfully agree with that observation and I would add this to it. If, as in the present case, the parties are represented by solicitors in the county Court and the county Court Judge delivers an oral judgment giving reasons for his decision, the solicitors should take the best note that they can take of the Judge's observations and an endeavour should be made to have an agreed note for the use of the Court of Appeal. If it is found impossible to agree a note, such notes as are made by the respective solicitors should be available for the use of the court.

In *Hayman v. Rowlands* [1957] All ER 321, Denning LJ, as he then was, said at p. 322:

> An application has been made to us to receive an affidavit from a solicitor as to what happened in the county Court. The Judge's note contains a statement of the evidence given before him but no note of the reasons for his decision. It has been submitted by Counsel for the plaintiff that we ought not to look at his affidavit. He refers to the rule of this Court [R.S.C., O. 58, r. 18 (5)] which says that the Judge's note has to be furnished and in default of production of such a note:
>
> > the Court of Appeal may hear and determine the appeal upon any other evidence or statement of what occurred before the Judge of the county Court which appears to the Court of Appeal to be sufficient.
>
> He says that here there is the Judge's note, and that therefore we ought not to look at any other evidence or statement. I think that the rule only applies when there is a complete and full note by the county court Judge. If his note is not complete and is only a part of a note, then we habitually allow it to be supplemented by the note of counsel or by any other means which appears to us to be suitable. So in a case where counsel were not engaged, such as the present case, an affidavit from the solicitor concerned can be received. It ought to be submitted to the county Court Judge before hand, for his comments, especially if there is any difference. That has not been done in this case; but I do not think we need stand the case over for that to be done. The affidavit has been in the hands of the other side for nearly three weeks now, and if they had anything to query in it they ought to have queried it before now.
>
> I think, therefore, that we should receive this affidavit.

In *Bruen v. Bruce* [1959] 2 All ER 375, Hodson LJ, as he then was, said:

> I desire to say a word on another matter which has arisen in this case. There was no note of the learned Judge's reasons for his decision and, as is common practice, Counsel's note was written out and agreed with the other side. Unfortunately it was not submitted to the learned Judge before the appeal came on for hearing, so that he had no opportunity of checking it. I desire to draw attention to the terms of R.S.C., O. 58, r. 18(15), which this court has previously done in *Hayman v. Rowlands* (1) [1957] 1 All ER 321). It is, I think, convenient, where there are only notes of evidence and no notes of the learned Judge's judgment, except a very brief note, that Counsel's note should be used only after it has been submitted to the learned Judge.

Halsbury's Laws of England, 4th Edn, Vol. 3, p. 622 on the duty of barristers says:

> Counsel on each side should take a note of the substance of the ... judgment for the information of the appeal Court in the event of an appeal.

From the above, we would draw the following conclusions: while our r. 68 places on a Judge who has given oral judgment the duty of "certifying in writing the grounds" of his judgment, nevertheless it is eminently desirable for Counsel to take a note of the judgment, especially if his client is likely to appeal in case judgement goes against him. If his client is anxious to have the appeal disposed of early, counsel should refer the note first to Counsel on the other side and then to the trial Judge for his comment, if the note is agreed. It is desirable that this reference be made as soon as possible, otherwise he might forget. If the Judge certifies the agreed note as a true record of the grounds of his judgment, it may be treated as the written certificate of his judgment within r. 68. If he does not, Counsel's affidavit made available for our use should contain a note made by him of what was said by the learned Judge when delivering judgment and the Judge's comment thereon, and counsel for the other side should be free to make whatever comment he thinks fit during the course of argument on the merit.

If counsel for the other side does not agree with the note, the note and his comment on it should be referred to the trial Judge for his comment; and the note and the comments of both Counsel on the other side and the Judge should be made available to help us.

If both counsels took a note of the judgment, it is desirable that they be shown each other's note. If they agree, the agreed note, and if they do not agree, the note taken by each counsel should be submitted to the Judge for his comment. In either case the agreed note or the notes of each counsel and the Judge's comment should be made available for our use.

The above notwithstanding, we would emphasize that the best aids that can be provided for our use are grounds written by the trial Judge himself.

In the circumstances of this appeal, we would receive Mr. Peddie's affidavit, but first it should be shown to Mr. Palasuntharam who appeared on the other side at the trial to give him an opportunity to comment, and then it, together with his comment if any, be submitted to the learned Judge for his comment. Mr. Peddie's affidavit containing his note, Mr. Palasuntharam's and the learned Judge's comment, if any, should then be made available for our use.

We will fix a date for hearing arguments on the merits, after we have been informed that action has been completed in accordance with our direction.

Also found at [1982] CLJ 348